No. 80-2152

Office Supreme Court, U.S.
FILED
JUL 6 1981
ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

STATE OF MISSOURI, *et al.*,
Petitioners,
vs.
CRATON LIDDELL, *et al.*,
and
EARLINE CALDWELL, *et al.*,
and
JANICE ADAMS, *et al.*,
and
BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, *et al.*,
and
THE CITY OF ST. LOUIS, MISSOURI,
and
THE UNITED STATES OF AMERICA,
Respondents.

On Application for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICUS CURIAE, THE BOARD OF EDUCATION OF THE PARKWAY SCHOOL DISTRICT OF ST. LOUIS COUNTY, MISSOURI, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

DONALD J. STOHR
R. J. ROBERTSON, JR.
THOMPSON & MITCHELL
One Mercantile Center
Suite 3400
St. Louis, Missouri 63101
314/231-7676
Attorneys for Amicus Curiae, Board of Education of the Parkway School District of St. Louis County, Missouri

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED

1. Whether, in a school desegregation case, the State of Missouri can be ordered to develop and submit to the court plans for interdistrict school desegregation where affected suburban school districts are not parties to the case, where interdistrict relief was not sought by the parties, and where there has been no finding that any suburban school district is not operating a unitary school system nor that any suburban school district or the State of Missouri has intentionally committed racially discriminatory acts which have been a substantial cause of interdistrict segregation?

2. Whether compelling the State of Missouri to prepare plans for interdistrict school desegregation involving school districts which are not parties to the litigation violates the due process rights to notice and a hearing of those school districts?

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INTEREST OF AMICUS CURIAE

Amicus curiae, the Board of Education of the Parkway School District of St. Louis County, Missouri, respectfully prays that this Court issue a writ of certiorari sought by Petitioners, the State of Missouri, *et al.*, to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on February 13, 1981. The consent of the attorneys for all parties in this case has been obtained, which consents have been filed separately with the Clerk's Office.

The interest of the Board of Education of the Parkway School District in this case arises from the fact that it is one of the school districts in St. Louis County, Missouri which has not yet been named as a party to the school desegregation suit pending in the United States District Court for the Eastern District of Missouri. Although not yet a party, the District Court's order of May 21, 1980, as amended, which was affirmed by the decision of the United States Court of Appeals for the Eighth Circuit sought to be reviewed by Petitioners, requires the State of Missouri and other parties to submit to the District Court plans for interdistrict school desegregation encompassing, at least, the 23 autonomous school districts in St. Louis County, Missouri. If these orders are not reviewed by this Court, it will allow the District Court to approve and implement the interdistrict plans which could result in the impositon of affirmative remedial obligations on the Parkway School District, without the Parkway School District ever having been found to have committed a constitutional violation justifying its inclusion in an interdistrict remedy.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A to the petition for a writ of certiorari filed by the Petitioners. The opinion of the United States District Court for the Eastern District of Missouri is reported at 491 F. Supp. 351.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on February 13, 1981 and the Court of Appeals denied petitions for rehearing or rehearing en banc on March 19, 1981. A copy of the order denying the petitions for rehearing appears in Appendix B to the petition for a writ of certiorari filed by Petitioners. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> AMENDMENT V — CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY
>
> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

This school desegregation case was begun in 1972, when Craton Liddell, his mother, and other members of the Concerned Parents of North St. Louis and their children ("the Liddell plaintiffs") filed a complaint in the United States District Court for the Eastern District of Missouri seeking to represent the class of school children and their parents in the St. Louis,

Missouri public school system. Named as defendants were the St. Louis City Board of Education ("the City Board"), its individual members and certain administrators. Plaintiffs alleged that defendants had "effected and perpetuated racial segregation and discrimination" in the operation of the public schools of the City of St. Louis, in violation of the Fourteenth Amendment.

After approximately one year of discovery proceedings, a class was certified. After some one and a half years of negotiation, the Liddell plaintiffs and the City Board entered into a consent decree which was approved by the District Court. Objections to the consent decree were filed by organizations representing St. Louis City teachers and by a second group of City students and parents ("the Caldwell group") who were joined by the St. Louis chapter of the National Association for the Advancement of Colored People. At this time, the Caldwell group also moved to intervene as parties plaintiff. The District Court denied the Caldwell group's motion to intervene and they appealed. The Court of Appeals reversed. *Liddell* v. *Caldwell*, 546 F.2d 768 (8th Cir. 1976). Although the only issue presented to the Court of Appeals was whether the District Court erred in denying intervention, *id.* at 769, the Court of Appeals stated:

> In view of the difficult problems in working out a meaningful constitutional plan, we suggest to the district court that it invite the United States Department of Justice to intervene, and that the same invitation be extended to the Missouri State Board of Education. We recommend that the parties explore the creation of a bi-racial citizens advisory committee, which has worked so successfully in other areas of the country. The Supreme Court decision in *Milliken* v. *Bradley*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974), seemingly deters the merger of two school districts unless racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or unless district lines have been deliberately

> drawn on the basis of race. However, investigation into the voluntary cooperation of the county in accepting minority transfers should not be overlooked.

Id. at 774 (citations omitted). This Court denied the City Board's petition for a writ of certiorari. *St. Louis Bd. of Education* v. *Caldwell*, 433 U.S. 914 (1977).

By various orders in 1977, the United States, the City of St. Louis, Janice Adams (representing the Concerned Parents for Neighborhood Schools), and Mary Puleo (representing the Involved Citizens Committee) were allowed to intervene as plaintiffs. Also during this time, the State of Missouri, the Commissioner of Education of the State of Missouri, and the State of Missouri Board of Education and its individual members were added as parties defendant.

The case proceeded to trial on questions of both liability and remedy. On April 12, 1979, the District Court rendered its decision and found no constitutional violation by any of the defendants. *Liddell* v. *Board of Education of St. Louis*, 469 F. Supp. 1304 (E.D. Mo. 1979). On appeal, the Eighth Circuit reversed and found that the City Board had failed to disestablish the dual school system it had maintained prior to this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). Specifically, the Court of Appeals held:

> The dual school system in St. Louis legally mandated before 1954 and perpetuated by the Board of Education's 1954-1956 desegregation plan, has been maintained and strengthened by the actions of the Board in the years since. The Board's steadfast adherence to a student assignment policy which did not desegregate the schools and its use of intact busing, school site selection, block busing, permissive transfers, and faculty assignments have preserved segregation in the school system.

Adams v. *United States*, 620 F.2d 1277, 1288 (8th Cir. 1980) (en banc).

Although the only question before the Court of Appeals was whether the City Board had effectively created and operated a unitary school system within the City of St. Louis, the Court of Appeals commented:

> Dr. Orfield [an expert witness testifying for the United States] agreed with the Board of Education that an inter-district remedy funded by the State of Missouri would have the best chance of permanently integrating the schools in the metropolitan St. Louis area.[27]

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27. Dr. Orfield testified:

> [T]he most stable kind of plan is a metropolitan-wide proportional enrollment plan * *.
>
> * * * * * * * *
>
> Anything that can be done to involve the suburban districts should be done.

In *Milliken* v. *Bradley*, 418 U.S. 717, 744-745, 94 S.Ct. 3112, 3127, 41 L.Ed.2d 1069 (1974), the Supreme Court stated that, in order for an inter-district remedy to be appropriate,

> it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation.

St. Louis County suburban school districts, pursuant to state law prior to *Brown*, collaborated with each other and with the City of St. Louis to ensure the maintenance of segregated schools. *See* Act of April 9, 1917, 1917 Mo.

> Laws 498 (repealed 1957) (providing for the "Colored Consolidated High School District" of St. Louis County); Act of February 17, 1865, § 13, 1865 Mo. Laws 170 (repealed 1957) (providing, *inter alia,* for the inter-district transfer of "colored children"). Included among the pre-*Brown* practices of these districts was the assignment and transportation of black students living in the suburbs to black schools in the City. Moreover, as noted in Part VI of this opinion, governmental policies may have intensified segregation in the St. Louis area.

Id. at 1294-95 & n. 27 (citations omitted).

The Court of Appeals remanded the case to the District Court and ordered that the City Board submit a desegregation plan to the District Court and that, after a hearing, a desegregation plan was to be implemented in the City of St. Louis no later than the beginning of the 1980-81 school year. *Id.* at 1295. Only the Adams plaintiffs filed a petition for a writ of certiorari, which this Court denied. *Adams* v. *United States,* ____ U.S. ____, 101 S. Ct. 88, 66 L. Ed.2d 29 (1980).

The City Board timely submitted to the District Court its plan for desegregation of the St. Louis City public schools. On May 21, 1980, the District Court approved the plan, with minor modifications. *Liddell* v. *Board of Education,* 491 F. Supp. 351 (E.D. Mo. 1980). In paragraph 12 of its order approving the plan, the District Court stated:

> The State defendants, the United States and the St. Louis Board of Education are ordered and directed as follows:
>
> a) To make every feasible effort to work out with the appropriate school districts in St. Louis County and develop, for 1980-81 implementation, a voluntary, cooperative plan of pupil exchanges which will assist in alleviating the school segregation in the City of St. Louis, and which also insures that inter-district pupil transfers will not impair the

desegregation of the St. Louis school district ordered herein, and submit such plan to the Court for approval by July 1, 1980.

b) To develop and submit to the Court by November 1, 1980, a plan for the consolidation or merger and full desegregation of the separate vocational educational programs operated by the Special District of St. Louis County and the school district of the City of St. Louis, for implementation in the 1981-82 school year.

c) To develop and submit to the Court by November 1, 1980, a suggested plan of inter-district school desegregation necessary to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County.

491 F. Supp. at 353.

The District Court then addressed the liability of the State of Missouri and various state officials and agencies and concluded:

> In sum, the State defendants stand before the Court as primary constitutional wrongdoers who have abdicated their affirmative remedial duty. Their efforts to pass the buck among themselves and to other state instrumentalities must be rejected.

Id. at 360. The Court ordered the State to fund one-half of the desegregation budget, up to a maximum of eleven million dollars.

The State of Missouri and three parent groups appealed from the District Court order. The State of Missouri challenged the above-recited provisions of paragraph 12 of the District Court's May 21, 1980 order and argued that the District Court was without authority to order the preparation of interdistrict desegregation plans unless and until the affected school districts in St. Louis County are joined as parties to the lawsuit. The

Eighth Circuit rejected this argument and affirmed, finding that the interdistrict plan called for by a paragraph 12(a) was permissible because it is "voluntary" and that the interdistrict plan called for by paragraph 12(c) was permissible "to the extent any such segregation was imposed by the State or other defendants, and to the extent those defendants have the power to remedy the violation." *Liddell, et al.* v. *Board of Education, et al.*, Nos. 80-1458, 80-1494, 80-1531, 80-1599, and 80-1735 (8th Cir. February 13, 1981) (Petition at A-15 to A-16).

While the appeal before the Eighth Circuit was pending, the Caldwell group and the City Board each filed motions in the District Court for leave to amend their pleadings to assert claims for interdistrict desegregation relief against some 40 separate and autonomous school districts in suburban St. Louis, St. Charles, and Jefferson Counties. To date, the District Court has not ruled upon these motions.

Also during the pendency of the appeal, the District Court modified paragraph 12(a)-(c) of its May 21, 1980 order to extend the time for filing the plans required to be submitted. In addition, the following paragraph was added to paragraph 12(c):

> On or before February 16, 1981 the State defendants and the St. Louis Board of Education shall prepare and submit to the Court a feasibility plan of inter-district school desegregation involving the St. Louis school district and such suburban school districts, that will provide complete and lasting school desegregation. These considerations may apply to those suburban school districts which are not necessarily confined to the suburban districts located in St. Louis County but limited only by considerations of feasibility and practicality, including reasonableness of transportation times and distances. This feasibility plan should include educational and ancillary components such as those outlined in the Court of Appeals' opinion of March 3, 1980 in this case, *and should specifically include*

pupil assignment and administrative reorganization provisions. (Emphasis added).

Petition at A-43.

By order of March 4, 1981, the District Court compelled the State Defendants to prepare a "voluntary" interdistrict plan pursuant to paragraph 12(a) of the District Court's May 21, 1980 order within 60 days or face the possibility of being held in contempt of court. Further, the District Court said that if the "voluntary" plan is not submitted, "[t]his Court will be left no alternative but to adopt a plan *to remedy the effects of constitutional violations.*" Petition at A-59 to A-60 (emphasis added).

On May 4, 1981, the City Board and the United States Department of Justice filed a joint plan for voluntary interdistrict desegregation and the State of Missouri filed a similar, but separate, voluntary plan. The Court has yet to rule on such plans.

On May 11, 1981, hearings were begun on the issues relating to the merger or consolidation of the vocational programs of the Special School District of St. Louis County with the City Board. The parties have presented a consent decree relating to the Special School District and paragraph 12(b), the terms of which have been approved by the District Court as a vocational plan under paragraph 12(b). Petition at A-65 *et seq.*

The State of Missouri and the various individual defendants who are officials of the State of Missouri (collectively, "the State Defendants") have filed a petition for a writ of certiorari to review the Eighth Circuit's decision. Six days after the State Defendants served their petition, the District Court entered an order (reproduced in Appendix B hereto) terminating the reporting requirements under paragraph 12(c). This order was in response to a motion filed by the Caldwell group some four months ealier (reproduced in Appendix A hereto).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With This Court's Decision In *Milliken* v. *Bradley*, 418 U.S. 717 (1974)

In *Milliken* v. *Bradley*, 418 U.S. 717 (1974), this Court first addressed the question of when a District Court may properly impose a desegregation remedy encompassing more than one school district. A brief review of the facts in *Milliken* will show that case to be essentially identical to the facts presented in the instant case.

In *Milliken*, plaintiffs had filed a class action against the Board of Education of the City of Detroit, the Governor of Michigan, the Attorney General, the State Board of Education, and the State Superintendent of Public Instruction, and alleged that the public school system of the City of Detroit was segregated on the basis of race. The complaint sought injunctive relief which would eliminate the racially dual school system maintained in the City of Detroit. After a trial, the District Court found that governmental actions at all levels, federal, state and local, and combined to establish a pattern of residential segregation throughout the metropolitan Detroit area. The court further found that the Detroit Board of Education had created and maintained optional attendance zones, had otherwise created school attendance zones, and had engaged in school construction practices, all of which had the natural and foreseeable effect of creating and maintaining school segregation within the City of Detroit. The court further found that the State of Michigan had committed several constitutional violations with respect to the exercise of its general responsibility for, and supervision of, public education. For example, the State was found to have failed to provide funds for transportation of pupils within Detroit while it had provided many neighboring, mostly white, school districts with a full range of transportation services. The court also found that the State had acted to delay and impede school desegregation in Detroit by enacting legisla-

tion which delayed implementation of a desegregation plan voluntarily adopted by the Detroit Board of Education and by prescribing criteria for "free choice" and "neighborhood schools" which, the court determined, had both the purpose and effect of maintaining segregation in the Detroit school system.

As to the question of an appropriate remedy, the court ordered the Detroit Board of Education to submit a desegregation plan limited to the City of Detroit, but also ordered the State defendants to submit a desegregation plan encompassing the three-county metropolitan area. Thereafter, the court granted the motions to intervene filed by many of the suburban school districts which would be affected by a metropolitan-wide remedy. The intervenors were not allowed to assert any claim or defense previously asserted, were not allowed to reopen any issue previously determined, and were limited to filing objections, modifications, or alternatives to the metropolitan plan to be filed by the State defendants. The court then rejected a Detroit-only plan because it found such a plan would contribute to the perception of the Detroit school system as a one-race system. After hearings confined to "the size and expanse of the metropolitan plan," the court approved a "desegregation area" encompassing the Detroit school district and 53 suburban school districts, appointed a panel to submit "an effective desegregation plan" for the entire desegregation area, but did not specifically approve a particular interdistrict plan.

The District Court's decisions were affirmed in substantial part by a divided Court of Appeals. *Bradley* v. *Milliken*, 484 F.2d 215 (6th Cir. 1973) (en banc). This Court granted certiorari and reversed.

This Court reaffirmed its earlier statement in *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 16 (1971) that "[a]s with any equity case, the nature of the violation determines the scope of the remedy." 418 U.S. at 738. Ap-

plying this general principle, the Court formulated the following standard for when interdistrict desegregation relief may be ordered:

> Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation. Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.
>
> The record before us, voluminous as it is, contains evidence of de jure segregated conditions only in the Detroit schools; indeed, that was the theory on which the litigation was initially based and on which the District Court took evidence. With no showing of significant violation by the 53 outlying school districts and no evidence of any interdistrict violation or effect, the court went beyond the original theory of the case as framed by the pleadings and mandated a metropolitan area remedy. To approve the remedy ordered by the court would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy based on a standard not hinted at in Brown I and II or any holding of this Court.

418 U.S. at 744-45 (citation omitted).

The Court then went on to review certain language and incidental findings in the record which had been relied upon by the District Court and the Court of Appeals to justify the interdistrict relief. These included: (1) the State being held derivatively liable for the acts of the Detroit school board; (2) a predominately black suburban school had contracted to have black students transported to a predominately black high school in Detroit with the "tacit or express" approval of the State; (3) the state legislation rescinding the voluntary desegregation plan adopted by the Detroit school board; (4) the State's authority to supervise selection and approve construction of school facilities; and (5) financial limitations allowing suburban districts to make larger per pupil contributions thus perpetuating educational inequality.

The Court rejected these findings, collectively and individually, as being inadequate to justify an interdistrict remedy. The Court concluded:

> This, again, underscores the crucial fact that the theory upon which the case proceeded related solely to the establishment of Detroit city violations as a basis for desegregating Detroit schools and that, at the time of trial, neither the parties nor the trial judge was concerned with a foundation for interdistrict relief.

418 U.S. at 752 (footnote omitted).

This Court's rationale in *Milliken* compels the conclusion that the District Court and the Eighth Circuit misapplied existing law in ordering and approving the preparation of plans for an interdistrict remedy. As in *Milliken,* the following facts are present in the instant case: (1) the complaints filed sought relief only in the St. Louis City public school system; (2) the case was tried solely on a theory seeking relief limited to the St. Louis City public schools; (3) certain state agencies were parties to the pro-

ceeding and were found to be at least partially liable for the segregated condition of the St. Louis public school system; (4) no finding has been made that the State or any St. Louis County school district has committed any constitutional violations which have had an interdistrict effect; and (5) despite the foregoing, the State of Missouri has been ordered to prepare plans for interdistrict desegregation encompassing, at least, the 23 autonomous school districts in St. Louis County. The only relevant factual difference between *Milliken* and the instant case is that in *Milliken* the suburban school districts became parties to the case prior to the date the interdistrict remedy was ordered: in the instant case, none of the school districts in St. Louis County was made a party to the case prior to the order requiring submission of the interdistrict plans. Indeed, to date, only the Special School District of St. Louis County has been named as a party and that occurred only after the District Court ordered the submission of a plan to merge or consolidate the vocational programs of that district with the St. Louis City School District, to be implemented during the 1981-82 school year.

It is submitted that this conflict with the Court's decision in *Milliken* v. *Bradley* justifies the grant of certiorari to review the judgment below.[1]

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[1]It may be argued that because the District Court has not adopted particular interdistrict plans, *Milliken* is somehow inapposite. However, it should be remembered that no particular interdistrict plan was adopted in *Milliken*. *Bradley* v. *Milliken, supra,* 484 F.2d at 218. Furthermore, if there were ever any doubts that the plans required by paragraph 12(a)-(c) are designed to be implemented, and implemented quickly, they were dispelled by the Eighth Circuit's February 13, 1981 opinion where the court stated:

> We take judicial notice of the fact that the Board of Education and one of the parent groups have filed amended complaints in the district court, asking the court to require interdistrict integration with the schools of St. Louis, St. Charles and Jefferson Counties. We express no opinion as to the merits of

2. The Decision Below Raises Series Questions As To The Proper Exercise Of Federal Judicial Power In Relation To State And Local Governments

The interdistrict remedial plans called for by paragraph 12 have been ordered in spite of the fact that the school districts in

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> the proposed amendments. *We do, however, emphasize that the pendency of these petitions must not be permitted to delay the full and complete implementation of every feature of the plan developed by the district court and approved by this Court, including those sections of the plan that relate to inter-district integration.*

Liddell, et al., v. *Board of Education, et al., supra*, slip. op. at 10 (Petition at A-7) (emphasis added).

Furthermore, it may be argued that any questions relating to the propriety of paragraph 12(c) are now moot in view of the District Court's order of June 23, 1981 (Appendix B hereto), which terminated further reporting requirements under paragraph 12(c). Even disregarding any inferences that arise from the somewhat unusual timing of the order (filed six days after the State Defendants' petition was served), it is clear that the order merely suspends the reporting requirements and does not bring an end to proceedings under paragraph 12(c). Indeed, the order clearly comtemplates further proceedings:

> This Court retains jurisdiction of this matter for all purposes, including entry of such additional orders as may, from time to time, be necessary and proper related to paragraphs 12(a) and 12(c) of Judge Meredith's order dated May 21, 1980, as amended.

Moreover, this order further reinforces the arguments made in support of the State Defendants' unsuccessful application for a stay, *Missouri* v. *Craton Liddell*, ___ U.S. ___, 68 L.Ed.2d 290 (No. A-825, April 20, 1981), that paragraph 12(c) is being used as a coercive device to compel participation in a "voluntary" plan by St. Louis County school districts. Thus, until such time as paragraph 12(c) is entirely stricken, its coercive impact on St. Louis County school districts continues unabated. It is suggested that this "on again, off again" "carrot and stick" treatment of paragraph 12(c) should not shield the decision below from review. *Cf. United States* v. *Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968) ("Mere voluntary cessation of allegedly illegal conduct does not moot a case. . . . A case might become moot if subsequent events made it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.") (Emphasis added).

St. Louis County have not had any opportunity to present evidence relating to whether they have committed any constitutional violations having an interdistrict effect. Such proceedings raise substantial questions as to the appropriate role of the federal judiciary in relation to the operation of state and local government entities. In *Dayton Bd. of Education* v. *Brinkman*, 433 U.S. 406, 410 (1977), this Court stated:

> [T]he case for displacement of the local authorities by a federal court in a school desegregation case must be satisfactorily established by factual proof and justified by a reasoned statement of legal principles.

In complete disregard of this standard, the sole factual finding supporting the District Court's conclusion that the State Defendants are "primary constitutional wrongdoers" reads as follows:

> 12. The State of Missouri, which together with State officials and the State Board of Education was joined as a defendant, is jointly and severally liable with the defendant Board for the costs pertaining to the Desegregation Plan. The State of Missouri, which prior to 1954 mandated school segregation, never took any effective steps to dismantle the dual system it had compelled by constitution, statutory law, practice and policy. The State of Missouri is liable for the de jure segregation which existed in the St. Louis Public Schools. Thus, as recognized in the Court of Appeals opinion, it is within the equitable power of this Court to require the State to pay a portion of the costs of desegregation. In the light of the financial position of the district, the nature of the violations committed by the parties, and all the appurtenant circumstances, it is appropriate that the State be required to pay one-half of the total costs to implement the Desegregation Plan for the public schools of the City of St. Louis.

491 F.Supp. at 357.

Similarly, the sole factual finding supporting the order to prepare a plan for the merger or consolidation of the vocational programs of the Special School District of St. Louis County with the St. Louis City School District reads as follows:

> 17. The existing dual system of vocational education split between the City and St. Louis County is neither educationally sound nor administratively efficient. These systems, established in 1965 and 1967, are further evidence of the continuing failure of the State to take any effective measures to disestablish the dual system in the State. The State has the power to effectively merge these systems. Its failure to exercise that power is part and parcel of its failure to take affirmative steps to eradicate root and branch the dual system it once formally mandated.

Id. at 358.

Similarly, the statement of the Court of Appeals that St. Louis County school districts "collaborated with each other and with the City of St. Louis to ensure the maintenance of segregated schools" is based solely on the existence of state statutes enacted in 1865 and 1917 (both of which were repealed in 1957) which mandated racial segregation in schools and on the alleged transportation of an unspecified number of black students residing in unspecified areas in St. Louis County to unspecified schools in the City of St. Louis at some unspecified time prior to *Brown*. *See* 620 F.2d at 1294-95 n. 27.

These statements, which have no articulated evidentiary basis in the record and which go well beyond the issues pleaded in this case, reflect a serious disregard for the adjudicative principles established by *Dayton*.

In short, the only theory asserted in support of an interdistrict remedy is that the State of Missouri maintained segregated schools by law prior to 1954 and that the State "failed to disestablish" those segregated schools in the City of St. Louis.

Such a theory, if upheld by this Court, would justify the imposition of interdistrict remedies in any state which mandated racial segregation in schools prior to 1954, so long as any single school district in that state is found to have failed to have created a unitary school system within its own boundaries. Not only is such a theory patently inconsistent with this Court's decision and rationale in *Milliken*, it would also allow federal courts to reorganize the entire educational system of a state based on a merely localized constitutional violation.[3]

It is respectfully suggested that the decision below constitutes such a cavalier intrusion on the operation of state and local governments and presents such sufficiently serious questions of comity and the exercise of the powers of the federal judiciary as to warrant review by this Court.

3. The Decision Below Raises Serious Questions As To Due Process Rights Of Persons Who Are Not Parties To Litigation

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[3]Even disregarding the interdistrict aspects of this litigation, it is clear the decision below was rendered in violation of well-established principles governing school desegregation cases. As noted above, the only basis on which the State's liability was predicated was its "failure to disestablish" the segregated schools in the City of St. Louis. Such a "failure to disestablish" theory has previously been utilized by this Court only in regard to the liability of local school districts which exercise day-to-day control over educational affairs. *E.g., Dayton Bd. of Education* v. *Brinkman,* 443 U.S. 449 (1979), *Green* v. *County School Board,* 391 U.S. 430 (1968). A finding of liability as to a state, which does not control the day-to-day operation of local school districts, has been upheld only where there has been a showing of *affirmative* segregative action by the state. *E.g., Milliken* v. *Bradley,* 433 U.S. 267, 269 n. 1 (1977)(State of Michigan enacted legislation delaying implementation of voluntary desegregation plan in Detroit). Not only did the decision below fail to find any affirmative segregative action by the State of Missouri, it completely failed to discuss whether the State's action or inaction was the result of a purposeful intention to segregate on the basis of race, a prerequisite to any finding of an equal protection violation. *Washington* v. *Davis,* 426 U.S. 229, 242 (1976).

At the time the District Court's May 21, 1980 order was entered, no St. Louis County school district was a party to the case. Only after the District Court's order was appealed was the Special School District made a party to the proceedings in the District Court. None of the 23 autonomous St. Louis County school districts has been made a party or been allowed to present evidence or objections relating to its liability or relating to the remedy requiring the preparation of plans for interdistrict school desegregation.

In *Milliken,* this Court found it unnecessary to decide whether the limited role afforded the suburban Detroit school districts in contesting the interdistrict plan violated their due process rights. 418 U.S. at 752. Similarly, if this Court should determine that the decision below was rendered in violation of the standards for interdistrict relief established in *Milliken,* it may be unnecessary to determine whether the decision below violated the due process rights of the St. Louis County school districts. Nevertheless, the decision below raises basic questions as to when a federal court may order the dismantling or reorganization of state or local government entities without allowing those entities an opportunity to appear and defend their interests.

This Court has on many occasions emphasized the importance of the fundamental due process protections of notice and a right to a fair and impartial hearing guaranteed by the Fifth Amendment to the United States Constitution:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for a hearing appropriate to the nature of a case. *Mullane* v. *Central Hanover Trust Co.,* 339 U.S. 306, 313 (1950).
>
> A fundamental requirement of due process is "the opportunity to be heard" . . . It is an opportunity which must

be granted at a meaningful time and in a meaningful manner. *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965).

There can be no doubt that the school districts in St. Louis County have never been afforded notice or any opportunity to be heard in relation to the preparation of the interdistrict school desegregation plans.

It is submitted that the decision below constitutes such a radical departure from the accepted and usual course of judicial proceedings and long-established principles of procedural due process as to call for an exercise of this Court's supervisory powers.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

The undersigned has been authorized to represent that attorneys for the Pattonville, Ritenour, Rockwood, Webster Groves, and Riverview Gardens school districts in St. Louis County, Missouri concur in the request that the writ of certiorari issue in this case.

Respectfully submitted,

DONALD J. STOHR
R.J. ROBERTSON, JR.
THOMPSON & MITCHELL
One Mercantile Center
Suite 3400
St. Louis, Missouri 63101
314/231-7676

Attorneys for Amicus Curiae,
the Board of Education of the
Parkway School District of St.
Louis County, Missouri

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Civil Action
No. 72-100 C(4)

Craton Liddell, et al.,
Plaintiff,

v.

The Board of Education of the City of St. Louis, Missouri, et al.,
Defendants.

CALDWELL PLAINTIFFS-INTERVENORS' MOTION TO TERMINATE FURTHER REPORTING UNDER PARAGRAPH 12(c) OF THE COURT'S ORDER OF 21 MAY 1980, AS AMENDED BY ORDER OF 17 SEPTEMBER 1980

The Caldwell plaintiffs-intervenors respectfully move the Court to enter an order terminating further reporting pursuant to paragraph 12(c) of this Court's order of 21 May 1980, as amended by the Court's order of 17 September 1980. In support of this motion, plaintiffs-intervenors show the Court as follows:

1. By paragraph 12(c) of the Court's 21 May order, the United States, the State defendants and the defendant St. Louis Board were required to develop "a suggested plan of inter-district school desegregation necessary to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County." By order of 17 September 1980 the Court amended the paragraph 12(c) requirement as follows: "On or before February 16, 1981 the State defendants and the St. Louis Board of Education shall

prepare and submit to the Court a feasibility plan of inter-district school desegregation involving the St. Louis school district and such suburban school districts, that will provide complete and lasting school desegregation."

2. The Caldwell plaintiffs-intervenors were the principal proponents of paragraph 12 of the 21 May order, including paragraph 12(c) thereof. It was and is the position of plaintiffs-intervenors, supported by the findings and orders of this Court and the recent opinion of the Court of Appeals, that the desegregation plan heretofore approved for the City of St. Louis is inadequate to dismantle the remaining vestiges of government-imposed segregation from the St. Louis school district. It was and is plaintiffs-intervenors' understanding that paragraph 12(c) was designed to force the government wrongdoers in this case to continue to address the means necessary for eradicating these remaining vestiges of government-imposed segregation. It has also been the consistent position of plaintiffs-intervenors, however, that, despite the adjudicated findings of remaining vestiges of government-imposed racial dualism, no mandatory plan of inter-district desegregation can be ordered on the basis of the findings and the record as they now stand, for the simple reason that the Court and the parties have not yet addressed themselves to the interdistrict impact of such remaining vestiges.

3. On the basis of the numerous filings of the State defendants in this Court and in the Court of Appeals, the *amicus* briefs submitted by various proposed suburban school district defendants, conversations with counsel for the parties, including counsel for the State defendants, and conversations with the chairperson of the Desegregation Monitoring and Advisory Committee, plaintiffs-intervenors have determined that paragraph 12(c) is now operating as a perceived impediment to efforts to develop a voluntary plan of interdistrict desegregation pursuant to paragraph 12(a) of the 21 May order. The chairperson of the Monitoring Committee has requested, and the St.

Louis Board and the Caldwell plaintiffs-intervenors have generally agreed to, a two-month hiatus in the "interdistrict" phase of this litigation in order to facilitate development of a voluntary plan pursuant to paragraph 12(a). Although plaintiffs-intervenors do not believe that paragraph 12(c), properly understood, creates any actual obstacle to development of a paragraph 12(a) plan, we recognize that it is widely perceived as such. And while we remain skeptical as to the potential for paragraph 12(a) efforts to produce actual and meaningful desegregation, we have determined that such chances as there are will be facilitated by the termination of the requirements of paragraph 12(c).

4. We believe that the requirements or paragraph 12(c) have been satisified by one of the government parties to whom it was directed: the defendant St. Louis Board of Education. As stated above, the principal purpose of paragraph 12(c) was to force the government wrongdoers to continue to assess and address the nature and extent of their unconstitutional conduct, and the means of remedying same. The St. Louis Board has clearly fulfilled that purpose by its motions of 9 January 1981 for leave to add parties and to cross-claim for interdistrict desegregation; the obligations of the United States under paragraph 12(c) were eliminated by the Court's order of 17 September 1980; and the State defendants have determined to litigate the question of the interdistrict impact of their constitutional violation. In these circumstances, and in light of the interpretation placed upon paragraph 12(c) by the Court of Appeals' opinion of 13 February (slip op. 19-20), there is nothing further to be gained by additional reporting under paragraph 12(c), and it appears, at least from the perceptions of the adverse parties, that elimination of paragraph 12(c)'s requirements will facilitate efforts to achieve a voluntary plan of inter-district desegregation pursuant to paragraph 12(a).

WHEREFORE, for the foregoing reasons, the Caldwell plaintiffs-intervenors respectfully request the Court to enter an

order terminating the need for further proceedings under paragraph 12(c) of the Court's order of 21 May 1980, as amended.

Dated: 26 February 1981

Respectfully submitted,

/s/ WILLIAM E. CALDWELL
RICHARD B. FIELDS
Ratner & Sugarmon
525 Commerce Title Bldg.
Memphis, Tennessee 38103
(901) 525-8601

THOMAS I. ATKINS
General Counsel, NAACP
TERESA DEMCHAK
1790 Broadway
New York, New York 10019
(212) 245-2100

CHARLES H. STAPLES
Suite 647, 818 Olive Street
St. Louis, Missouri 63101
(314) 621-6108

Of Counsel:
PAUL R. DIMOND
O'Brien, Moran
& Dimond
320 North Main St.
Ann Arbor, Mich. 48104
(313) 769-6838

WILLIAM L. TAYLOR
Center for National
Policy Review
Catholic University
Law School
(202) 832-8525

Attorneys for Plaintiffs-Intervenors

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 72-100C(4)

Craton Liddell, et al.,
Plaintiffs,

v.

The Board of Education of the City of St. Louis,
State of Missouri, et al.,
Defendants.

ORDER

This matter is before the Court on the parties' separate motions related to paragraphs 12(a) and 12(c) of Judge Meredith's order dated May 21, 1980, as amended. To expedite ongoing efforts to design a voluntary, cooperative desegregation plan in compliance with the mandate of the United States Court of Appeals for the Eighth Circuit,

IT IS HEREBY ORDERED that the motion to Terminate Further Reporting Under Paragraph 12(c) filed by Caldwell plaintiffs-intervenors on February 27, 1981, H(8)81, be and the same is granted.

IT IS HEREBY FURTHER ORDERED that the post hearing motion to terminate 12(a) hearing and to commence 12(c) proceedings filed by Liddell plaintiffs, H(155)81, be and the same is denied.

This Court retains jurisdiction of this matter for all purposes, including entry of such additional orders as may, from time to

time, be necessary and proper related to paragraphs 12(a) and 12(c) of Judge Meredith's order dated May 21, 1980, as amended.

Dated this 23rd day of June, 1981.

/s/ WILLIAM L. HUNGATE
UNITED STATES DISTRICT
JUDGE